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"The most heinous of all crimes".

Reflections on the structure of homicide in Scots law

By Gerry Maher*

*"The different degrees of Homicide, considered as to their legal effect, are more the result of an improved system of law, than of any general and acknowledged rule, subsisting at all times, and founded on a just notion of the true nature of this crime."*¹

I

One of the classes taught by Gerald Gordon during his tenure as Professor of Criminal Law, and later in the Chair of Scots Law, at Edinburgh University was Honours Criminal Law. I inherited this class and Gerald's reading lists when he left to take up an appointment to the shrieval bench in 1976. The topics taught in that class over 30 years ago are not very much different from those included in Honours criminal law classes today.² But one matter not covered then but almost without exception considered now is the structure of homicide offences, an aspect of the criminal law which has generated extensive appellate decisions, academic commentary, and proposals for law reform. It also happens to be a matter on which Gerald Gordon's own writings have played a significant role in the development of the law in this country.

II

A useful starting point for this flurry of juristic activity is 15 July 1972. In Coventry, in the early morning of that day, Pearl Kathleen Hyam killed 2 girls by setting fire to the house they were in. Her purpose in resorting to arson was to frighten the girls' mother, a rival for the affections of a man with whom she had previously had a relationship, into leaving the neighbourhood. She did not intend to cause death or do injury to anyone. But did she commit murder? Was she a murderer? 'Yes' said a jury, the Court of Appeal and, in a decision which still provokes controversy, the House of Lords.³ Most of the opinions in this decision focused on the historical origins and contemporary authority on the mens rea of murder in English law, especially the question whether foresight of death or of serious bodily injury is equivalent to, or evidence of, intention.

The only Scottish judge in that case was Lord Kilbrandon, who issued a short opinion agreeing with dissenting opinion of Lord Diplock. But Lord Kilbrandon set out a more general point about the law of homicide:⁴

* Professor of Criminal Law, University of Edinburgh.

¹ J Burnett, *A Treatise on Various Branches of the Criminal law of Scotland* (Edinburgh, 1811), p 1 (note).

² See Appendix. This was the syllabus for the class taught in the mid 1970s.

³ *Hyam v DPP* [1975] AC 55, a 3-2 majority decision.

⁴ [1975] AC at 98E-H. Similarly in *R v Howe* [1987] 1 AC 417, Lord Hailsham of St Marylebone said (at 433): "Murder, as every practitioner of the law knows, though often described as one of the utmost heinousness, is not in fact necessarily so, but consists in a whole bundle of offences of vastly differing degrees of culpability, ranging from brutal cynical and repeated offences like the so called Moors murders to the almost venial, if objectively immoral, 'mercy killing' of a beloved partner."

"My Lords, it is not so easy to feel satisfaction at the doubts and difficulties which seem to surround the crime of murder and the distinguishing from it of the crime of manslaughter. There is something wrong when crimes of such gravity, and I will say of such familiarity, call for the display of so formidable a degree of forensic and judicial learning as the present case has given rise to. I believe this to show that a more radical look at the problem is called for... . There does not appear to be any good reason why the crimes of murder and manslaughter should not both be abolished, and the single crime of unlawful homicide substituted; one case will differ from another in gravity, and that can be taken care of by variation of sentences downwards from life imprisonment. It is no longer true, if it was ever true, to say that murder as we now define it is necessarily the most heinous example of unlawful homicide."

Yet how unlawful killings are to be separated and categorised has a longer history, and not only from a legal perspective. Consider the following passage from *Hamlet*.⁵

GHOST: List, Hamlet, oh list.
 If thou didst ever thy dear father love.
 HAMLET: O God!
 GHOST: Revenge his foul and most unnatural murder
 HAMLET: Murder?
 GHOST: Murder most foul, as in the best it is;
 But this most foul, strange, and unnatural.

 GHOST: It's given out, that sleeping in my orchard,
 A serpent stung me: so the whole ear of Denmark
 Is by a forged process of my death
 Rankly abus'd: but know thou noble youth,
 The serpent that did sting thy father's life
 Now wears his crown
 HAMLET: O my prophetic soul,
 Mine uncle?

This passage identifies a number of themes which feature in later debates. One is the contrast between murder as such ('most foul, as in the best it is') and aggravated murder ('most foul, strange and unnatural'). Another is the method of killing (poisoning); and another, the characteristics of the victim (a king). And a further point is the relationship between murderer and deceased (family members, brothers). All of these issues have for long featured, and continue to do so, in discussions of the structure of homicide. But to get an insight into contemporary debates one can consider the following list of offences.

First, there is the distinction between murder and culpable homicide, and in English law murder and manslaughter. These distinctions turn mainly on the required mental element for each offence, though the two legal systems define this key matter in different ways. In Scots law, the definition of murder is still largely based on the words of Macdonald:⁶

⁵ Act I, Scene 4.

⁶ JHA Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (5th edn, by J Walker and DJ Stevenson, 1948), p 89. The addition of the term 'wickedly' to describe the intention to kill is derived from *Drury v HM Advocate* 2001 SLT 1013. In that case the High Court radically re-interpreted the plea of provocation not as a mitigating circumstance which

"Murder is constituted by any wilful act causing the destruction of life, whether [wickedly] intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences."

By contrast culpable homicide is an unlawful killing where the accused lacks intention to kill or such wicked recklessness.

In English law murder is committed when the accused unlawfully kills the victim in circumstances where he intends (a) to kill the victim, or (b) to cause the victim grievous bodily harm. Manslaughter is an unlawful killing where the accused lacks either of these intentions

The distinction between murder and culpable homicide (and the corresponding distinction in English law) is basic to our understanding of the law of homicide but the precise way of marking the difference between the two has always been controversial. Because in modern law the distinction turns on mens rea, the offences are general homicide offences. But we also have particular homicide offences, which involve some definitional element other than mens rea.

In practical terms the most important of these involve killing on the roads. In recent years there has been a mushrooming of statutory offences of road traffic homicides. These offences include causing death by dangerous driving;⁷ causing death by careless or inconsiderate driving;⁸ causing death by driving while unlicensed, disqualified or uninsured;⁹ and causing death by careless driving when under the influence of drunk or drugs.¹⁰

A further statutory homicide offence is that of corporate homicide (corporate manslaughter in England) which can be committed only by a corporation or other type of organisation.¹¹

Furthermore, English law contains other particular homicide offences not known to Scots law. One is causing or allowing the death of a child or vulnerable adult.¹² Another is infanticide, which operates more as a defence akin to diminished

reduced murder to culpable homicide but rather as involving a type of criminal intention short of the 'wicked' intention which, according to the court, was part of the definition of murder. This re-interpretation is generally regarded as mistaken, and outwith the context of provocation the term 'wicked' adds little to the idea of intention in the context of murder (see J Chalmers, "Collapsing the structure of criminal law" 2001 SLT (News) 241; M Christie, "The coherence of Scots criminal law: some aspects of *Drury v HM Advocate*" 2002 Jur Rev 273).

⁷ Road Traffic Act 1988, s 1.

⁸ S 2B (added by Road Safety Act 2006).

⁹ S 3ZB (added by Road Safety Act 2006).

¹⁰ S 3A (added by Road Traffic Act 1991).

¹¹ Corporate Manslaughter and Corporate Homicide Act 2007. The types of organisation which can commit the offences are set out in s 1(2).

¹² Domestic Violence, Crime and Victims Act 2004, s 5, a provision said to be needed to deal with the problem where a child is cared for by two people and dies as a result of ill treatment but it is not clear which carer ill-treated the child. The Act allows for both carers to be convicted of this offence. The Home Office has indicated that it is likely that there will be few prosecutions of the new offence (Home Office Circular 9/2005, *Domestic Violence Crime and Victims Act*). For a general discussion see Jonathan Herring, "Mum's Not the Word: An Analysis of Section 5, Domestic Violence, Crime and Victims Act 2004" in CMV Clarkson & Sally Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (2008), ch 5.

responsibility. The offence arises where a mother kills her child (under the age of 12 months) but her mental state was disturbed as a consequence of the birth.¹³

There are also, towards or on the borderland of homicide offences, the crimes of concealment of pregnancy and abortion. Concealment of pregnancy deals with the situation where a woman's failing to take steps during pregnancy and the birth of her child leads to the death of the child, which can give rise to a statutory offence.¹⁴ English law has a further offence of child destruction which involves the killing of a child which is capable of being born alive by causing it to die before it has an existence independent of its mother.¹⁵

Procuring an abortion, that is the destroying the life of a foetus at any time during pregnancy, is a crime at common law but this is subject to the provisions of the Abortion Act 1967.

In Scots law suicide is not a crime,¹⁶ nor is attempted suicide. It is not clear what offence, if any, is committed where two people make a suicide pact and one survives.¹⁷ By contrast, in English law the common law crime of suicide survived until abolished by statute in 1961 and there is a statutory offence of aiding, abetting or procuring a suicide or attempted suicide.¹⁸ Furthermore the survivor of a suicide pact who has killed the deceased or is party to him being killed by someone else is guilty of manslaughter (but not murder).¹⁹

Moreover, different categories of homicide exist not just in relation to the definition of offences but also in relation to sentencing. For example, in English law there are provisions for determining the minimum term to be given for the mandatory life sentence on a conviction for murder.²⁰ Various starting-points are set out which depend on factors such as the murder of a child which involved sexual or sadistic motivation; murder of a police officer in the course of his duty; murder done for gain; whether the offender was below the age of 18. In addition, there are various factors which are aggravating (such as a significant degree of premeditation or concealment of the body) and mitigating (intention to cause serious bodily harm rather than to kill, or the offender having been provoked in a way not amounting to a defence of provocation).

This snapshot of the structure of homicide captures the law in its current form but it is quite possible that this will change. The English Law Commission has recommended

¹³ Infanticide Act 1938. A conviction of infanticide in effect reduces a charge of murder to one of manslaughter. At the time of the 1938 Act English law had no plea of diminished responsibility, which was introduced by the Homicide Act 1957. However, recently the English Law Commission has recommended that a separate offence of infanticide should be retained (Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304 (2006), Part 8).

¹⁴ Concealment of Birth (Scotland) Act 1809. This Act replaced an Act of 1690 (APS ix, 195, c 50). One some views the offence is a species of the more general offence of culpable homicide (see Hume, *Commentaries on the Law of Scotland Respecting Crimes* (4th edn, 1844) I, 293).

¹⁵ Infant Life (Preservation) Act 1929.

¹⁶ Mackenzie recognised a category of 'self-murder' which had significance for questions of succession to the self-murderer's estate (George Mackenzie, *The Law and Customs of Scotland in Matters Criminal* (2nd edn, 1699), vol I, tit XIII).

¹⁷ For discussion see GH Gordon, "Suicide Pacts" 1958 SLT (News) 209.

¹⁸ Suicide Act 1961, s 2.

¹⁹ Homicide Act 1957, s 4(1).

²⁰ Criminal Justice Act 2003, s 269 and Sch 21.

some important reforms.²¹ In particular the present two-tiered structure of murder and manslaughter would be replaced by a three-tiered structure of first degree murder; second degree murder; and manslaughter. First-degree murder would cover intentional killings and killings with intent to cause serious injury where the accused was aware that his conduct involved a serious risk of causing death. Second-degree murder would cover killing with intent to do serious injury and killing with intent to cause some injury or risk of such an injury where the accused was aware of a serious risk of causing death. It would also cover cases of what would otherwise be first degree murder but a partial defence of provocation, diminished responsibility, or killing pursuant to a suicide pact was made out.²² Crucially, the mandatory life sentence would apply to first-degree but not second-degree murder. Manslaughter would extend to two situations: (1) killing through gross negligence and (2) killing through the commission of a criminal act which was either intended to cause injury or one that the accused was aware involved a serious risk of causing some injury.

At much the same time these issues had been considered by the Law Reform Commission of Ireland,²³ but the recommendations of that body varied from its English counterpart. For a start the Irish Commission proposed that the mandatory life sentence for murder should be abolished. Even if (as for political reasons is likely) that proposal was not accepted the mental element for murder should be broadened to include reckless killing manifesting an extreme indifference to human life. The mental element should also, as under current Irish law, include intention to cause serious injury but should not be expanded to include recklessness as to serious injury. The Commission also recommended that the law on unlawful and dangerous act manslaughter should be retained as should a reformulated version of gross negligence manslaughter. In addition there should be a new homicide offence "below manslaughter" of assault causing death.²⁴

III

What is driving this increased and still increasing interest and activity on the law of homicide? There are a number of overlapping origins for the recent interest in the structure of homicide offences.

(i) Perhaps the most influential source for existence of debates and arguments about the law of homicide is to be found in academic and scholarly writings on criminal law. Criminal law has for long been a core academic subject but until relatively recently was one which gave rise to only sporadic literature. This is not to say that writings on criminal law before this notional 'modern' era lacked depth. Two of the most significant works written on the subject in the 20th Century are Glanville Williams' *Criminal Law: The General Part* (first published in 1953) and Gerald Gordon's own book, first published in 1967. These books in turn inspired a blossoming of interest in the criminal law as an academic subject. Over the last 25 years or so academic

²¹ Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304 (2006), especially Part 2. Most the recommendations in the Report are as yet unimplemented.

²² The Commission also recommended re-formulation of the defences of provocation and diminished responsibility.

²³ Law Reform Commission (Ireland), *Homicide: Murder and Involuntary Manslaughter* (LRC No 87 (2008).

²⁴ Assault causing death would occur where an accused committed an assault which caused death and a reasonable person would not have foreseen that death or serious injury was likely to result in death.

writings have taken on a high level of maturity, combining both analytical sophistication and depth of normative theory.²⁵

There are two particular issues in this recent scholarship which have had an major impact of the structure of homicide offences, namely fair labelling, and 'levels' of rules of criminal law.

Fair labelling

The idea that the criminal law should embody a principle of fair labelling has become an accepted orthodoxy in criminal law scholarship and has also been accepted as an important principle for reforming the criminal law.²⁶ Its concern is with how criminal offences should be separated out from one another and with affixing each offence with a name or label that both describes that particular offence and marks it out as different from other offences, especially those similar or related to it in some way. As such, it has obvious implications for the structure of homicide offences.

However, despite its acceptance as a basic principle of criminal law, fair labelling has received very little detailed attention.²⁷ So it is hardly surprising that when it is put under critical scrutiny a picture emerges of a concept or principle which operates at various levels and serves different purposes. For example, labelling offences for the purpose of guiding sentencing decisions²⁸ can result in a quite different set of categories from labels used to communicate with offenders or victims. Cutting across this kind of distinction is another which is more functional. Chalmers and Leverick point out that for purposes of addressing the general public labelling is important as a mode of describing offences. In contrast, where labelling is addressed at personnel working within the criminal justice system its function is that of differentiating offences or more importantly pointing to differences within one category of offence.

In short, there is very little reason to suppose that there is one, and only one, way of labelling criminal offences, including homicide. Rather there are a whole range and levels of labels, depending on the purpose of the exercise and its addressees.

Levels of rules

This conclusion is supported by another strand of contemporary criminal law theory. This is the distinction drawn between different levels of rules within criminal law.²⁹ The essential idea is that some rules are aimed at guiding the conduct of citizens, while others provide guidance for courts and other officials in determining questions

²⁵ For a useful survey of these developments see RA Duff, "Theorising Criminal Law: a 25th Anniversary Essay" (2005) 25 *Oxford Journal of Legal Studies* 353.

²⁶ For a comprehensive account of the topic see James Chalmers and Fiona Leverick, "Fair Labelling in Criminal Law" (2008) 71 *Modern Law Review* 217. An example of its application in law reform is Law Reform Commission (Ireland), *Homicide: Murder and Involuntary Manslaughter* (LRC No 87 (2008), paras 1.01-1.02 (headed 'labelling and moral culpability')).

²⁷ Chalmers and Leverick (op cit at p 220) noted that "while frequently deployed, however, fair labelling has sometimes been assumed to be a principle of self-evident value; it has often been invoked without any consideration of its underlying principles."

²⁸ An example in English law, noted earlier, is the Criminal Justice Act 2003, s 269 and Sch 21.

²⁹ The standard texts are Peter Alldridge, "Rules for Courts and Rules for Citizens" (1990) 10 *Oxford Journal of Legal Studies* 487; M Dan-Cohen "Decisions Rules and Conduct Rules: On Acoustic Separation in Criminal Law" (1984) 97 *Harvard Law Review* 625; and PH Robinson, "Rules of Conduct and Principles of Adjudication" (1990) 57 *University of Chicago Law Review* 729.

of breach of the criminal law and attribution of criminal responsibility. Again, it has been recognised that this distinction has direct implications for the ways in which offences are described and differentiated.³⁰

(ii) A further explanation for the new interest in the structure of homicide lies in the work of law reform bodies, some of which has already been noted. In both England and Wales and in Ireland the official law reform agencies were moved to considering questions of the law of homicide in general by earlier examination of the law on partial defences to homicide, especially provocation.³¹ In common law jurisdictions, many deep-rooted problems with the defence of provocation have been recognised by the courts and academic commentators, but there appears to be little hope of resolving these problems solely by the accepted law reform technique of proposing statutory redefinition. Rather the reform of provocation depends upon much wider issues such as the retention of the mandatory life sentence for murder and the distinction between murder and other categories of homicide.

A similar process may happen in Scotland. The Scottish Law Commission has indicated that it may consider the defence of provocation,³² but it is difficult to see how this law reform project could proceed without the Commission first considering the mandatory sentence for murder and general issues of the structure of homicide offences.

(iii) Another aspect of law reform which has implications for the law of homicide is the re-birth of interest in the codification of the criminal law. The Law Commission in England and Wales had for a long time regarded its work on criminal law as part of a rolling programme of finalising a project on codification.³³

An unofficial Draft Criminal Code for Scotland, drawn up by a group of distinguished lawyers, was published in 2003.³⁴ The Code does not, on the whole, deal with statutory offences and has nothing to say about homicide offences such as road traffic killings or corporate killings. It retains an offence of abortion very much in its present form but this is explained as a matter of the legislative competence of the Scottish Parliament.³⁵

³⁰ For example, Robinson, *op cit* at 758-764, accepts that whole criminal codes could be written at different levels and in different styles of language (what he calls Codes of Conduct and Codes of Adjudications).

³¹ In its *Report on Partial Defences to Murder* (LC No 290 (2004), para 2.74), the Law Commission recommended that it should be asked to conduct a more general review of the law of murder.

³² The topic was contained in the Commission's Seventh Programme of Law Reform but work on the project was delayed because of other commitments. The Commission has indicated that it intend to carry the subject over to its next programme.

³³ See, for example, Law Commission, *41st Annual Report 2006-07* (LC No 306), paras 5.16-5.17; *42nd Annual Report 2007-08* (LC No 310), paras 5.14-5.23. It is also worth noting that an official project for codifying the criminal law is under way in Ireland. For a statement of the planned programme for the code, see Criminal Law Codification Advisory Committee, *Annual Report 2008*.

³⁴ Eric Clive, Pamela Ferguson, Christopher Gane, and Alexander McCall Smith, *A Draft Criminal Code for Scotland with Commentary* (2003) The authors note that Sir Gerald Gordon took part in discussions in the later stages of preparation of the draft (*Draft Criminal Code*, p 1). Despite its unofficial status the Draft Code has proved influential in law reform projects. See, for example, Scottish Law Commission, *Report on Rape and Other Sexual Offences* (SLC No 209 (2007)), para 1.9.

³⁵ The intention of the Code team was that the Draft Code could be enacted by the Scottish Parliament. Abortion is a reserved matter under the Scotland Act 1988 (Sch 5, Part II, head J1).

The most direct aspect of the Draft Code on homicide offences is that it retains but redefines the distinction between murder and culpable homicide. The distinction is drawn primarily in terms of mens rea,³⁶ though provocation and diminished responsibility are kept as pleas which reduce a conviction for murder to one for culpable homicide.

The working on criminal codes has the obvious connection with the structure of homicide offences for that very issue is an important part of any code. But there is another significant, though perhaps less noted, point. This is the way in which homicide offences fit into the overall scheme of criminal offences and are differentiated from related offences (such as assault).³⁷

(iv) A further pragmatic explanation for some of the recent growth in separate offences is the existence of pressure groups involved with single issue politics who argue for specialised offences in the areas of concern to them.³⁸ This phenomenon is certainly in the background of some recent developments in English law noted earlier but it also applies to the new offence in Scots law of corporate homicide.³⁹ One problem about creating separate offences for separate situations, such as death in the work place or death of a vulnerable person, is that it might unduly fragment the law of homicide and disguise what these separate offences share with the broader categories of murder and culpable homicide.

IV

This section will seek to identify the main issues in the debates of the structure of homicide and will offer some brief comments on possible solutions, especially from the perspective of Scots law. It has to be said that, compared with other legal systems, there has been little discussion on many of these issues in Scotland.

One point which should be noted at the start is that Scots criminal law has historically taken a wide approach to the categorisation of crimes, the clearest example being assault, which is essentially a unified crime, despite the recognition of various factors (both common law and statutory) which may aggravate the commission of an assault. There is a general culture of avoiding over-differentiation of offences. Broad categories are preferred, with differences being marked out by means other than the specification of different offences. An example, which applies throughout criminal

³⁶ The mens rea of murder is defined as the intention of causing death or callous recklessness as to whether death is caused. (Draft Code, s 37(1)). Culpable homicide involves the causing the death of person recklessly or by an assault or another unlawful act likely to cause significant physical harm where there is intention or recklessness as to causing such harm (Draft Code, s 38).

³⁷ The Irish Law Reform Commission has recommended that there should be a new offence of assault causing death but the Commission still see this offence as part of the law of homicide rather than the law of assault. (Law Reform Commission, *Homicide: Murder and Involuntary Manslaughter* (LRC Report No 87 (2008)), para 5.46).

³⁸ See Jeremy Horder, "Homicide Reform and the Changing Character of Legal Thought" in CMV Clarkson & Sally Cunningham (eds), *op cit* at footnote 000, at pp 29-31.

³⁹ However, the politics of the changes brought about by the Corporate Manslaughter and Corporate Homicide Act 2007 Act are complicated by the fact that in Scotland much of the pressure group activity, especially by trade unions, was aimed at getting a bill before the Scottish Parliament. Nonetheless, the point remains that focus was made in Scotland on creating a particular homicide offence that could be committed only by corporations and similar organisations.

offences, including homicide, is aggravation by way of racial motivation.⁴⁰ More recently, however, there has been some move towards the use of a more elaborate differentiation of offences which fall within the heading of a general category of a crime.⁴¹

A related point is that labelling of homicide offences aimed at sentencers has much less point in Scotland where, in contrast with legal systems such as England and Wales, the whole sentencing system is far less structured and considerably more emphasis is placed on the discretion of the sentencing judge.

Homicide and the mandatory sentence for murder

Perhaps the key issue in debates on homicide is the mandatory sentence for murder. Historically much of the development of the law on the distinction between murder and culpable homicide, especially in relation to the partial defences of provocation and diminished responsibility, depended on the fact that murder was a capital offence and that today it continues to attract a mandatory life sentence.

Indeed in Hume's time there were two categories of murder: murder as such and aggravated murder.⁴² Hume gives several examples of this last sort of murders, such as murder under trust; killing in the royal presence; murder by assassination or poison; and the killing of a parent by a child or of child by a parent.⁴³ But the distinction between murder and aggravated murder itself reflected differences in what happened to the murderer. Hume explained that the pains of murder are death and confiscation of the moveable property of the murderer.⁴⁴ But he also pointed out that aggravated murder, which in some cases had earlier been re-classified as a form of treason, had been punished with "forfeiture of life, lands, and goods."⁴⁵

Could and should the mandatory sentence be removed? It is sometimes thought that public opinion would oppose this change and accordingly there would be no political will to introduce such a measure. However, it is not totally inconceivable that at least in Scotland, as a separate political system from the United Kingdom as a whole, such a change might happen and that sentencing for all forms of homicide would be discretionary (though subject to guidelines laid down by statute or judicial determination, including cases where a life sentence would be appropriate.).

⁴⁰ Crime and Disorder Act 1998, s 96. This approach, of not making separate offences but adding aggravating levels to existing crimes, applies also to crimes (including homicide) committed with prejudiced motivation in respect of a person's disability or sexual orientation (see Offences (Aggravation by Prejudice) (Scotland) Act 2009).

⁴¹ For example, the Sexual Offences (Scotland) Act 2009. Most of the provisions of this Act follow the recommendations of the Scottish Law Commission, which were based on a fair labelling principle. See Scottish Law Commission, *Report on Rape and Other Sexual Offences* (SLC No 209 (2007)), para 1.24.

⁴² "I have now to treat of the cases of AGGRAVATED MURDER; those cases, where on account of some singular baseness or cruelty in the manner of the deed, or some peculiar relation between the parties, out custom proceeds against the murderer with more than ordinary severity." (Hume, I, 286.)

⁴³ Hume's category of aggravated murder helps to explain the agitation of the Ghost in *Hamlet* and why he uttered the famous phrase 'murder most foul.' His killing was an aggravated murder at several levels: murder in the royal presence, indeed murder of the King; murder by poisoning; murder by way of assassination in the Scots law sense; and murder by a member of his own family.

⁴⁴ Hume, I, 284.

⁴⁵ Hume, I, 286.

Clearly if the mandatory sentence for murder remained, that situation would rule out one option for change, namely the reductionist approach of having one homicide offence. But if the mandatory sentence were abolished, an unitary offence approach would not be the only option, for there could be good reasons, for example based on fair labelling, for retaining different categories of homicide, even in that scenario. What might happen is that the current distinction between murder and culpable homicide would disappear, as that distinction is too much based on history to have much point if the mandatory sentence were to go. Different types of distinctions and classifications of homicides could instead be made.

But how would Scots law react to proposals to adopt a unified approach to homicides? Reductionism entails the collapsing of the distinction between murder and culpable homicide, and with it partial offences, as well as the bringing into the offence what are currently road traffic and corporate homicides.⁴⁶ A flavour of what such an offence would look like can be had from a suggested draft made by two writers who favour this approach:⁴⁷

"A person who, by any act or omission, intends to cause, or by behaviour manifesting recklessness, gross negligence or by reason of serious failure of corporate management, causes serious physical harm to another person resulting in that person's death, commits the offence of criminal homicide."

Of course, an approach such as this does not mean that there are no essential distinctions between different sort of killings. The point is that the differences appear not in the definition of the offence but elsewhere, particularly in respect of sentencing. Thus killings involving provocation would be defined in exactly the same way as those where it is absent but provocation would be a matter for consideration at the stage of sentencing.⁴⁸ It could be said that such a unified crime would parallel assault in Scots criminal law, which is one offence with one actus reus and one mens rea but which can be committed in a variety of aggravating ways or circumstances. But even on this definition homicide is not like assault, for there are a range of different fault elements involved in the unified homicide offence (seen most dramatically in 'serious failure of corporate management') which suggests different offences rather different ways of committing one offence.

Allied to this point is the question of appropriate labelling. Corporate homicide, for example, takes place in different social and moral contexts from a killing in the course of an armed robbery. And there does seem to be an important moral difference between a killing which is the purpose of an accused's conduct and one which arises, for example, from an accused's acting recklessly by throwing stones from a high building.

Maximum differentiation

⁴⁶ But even this approach does not incorporate abortion which has always been regarded as a different from other types of taking life and no one has seriously suggested otherwise.

⁴⁷ L Blom-Cooper and T Morris, *With Malice Aforethought* (Hart, Oxford, 2004), p 175. The next part of the draft clause states: "A person convicted of criminal homicide shall be liable to a sentence of life imprisonment, or a fine, unlimited in amount, or both, or such other non-custodial penalty including a hospital order as the court might deem appropriate."

⁴⁸ And it might be argued (in the spirit of 'levels of rules' considered earlier) that as sentencing is a part of the criminal law aimed at officials rather than citizens, the definition of provocation need not be made too finely, thus avoiding some of the problems with the present law in relation to that plea.

An opposite approach is to provide for different offences and labels to try to capture better than does the present law the richness of the ways in which different killings are differently wrong. The trouble is that the overall picture might become too rich. Consider, for example, the argument that appropriate labelling might require the following separate categories of unlawful homicide:⁴⁹ murder; killing upon provocation; killing during mental abnormality; killing by excessive force in self-defence; killing under duress; reckless killing; grossly negligent killing; killing as a result of an attack. To this list there can also be added: infanticide; corporate killing; causing death by dangerous driving (and other road traffic homicides).

The difficulty with this type of differentiation is that it does not make clear why fair labelling requires such detailed distinctions to be made. The killings are different but do they all need a separate label? For example, killing upon provocation and killing during mental abnormality (which must be something lesser than insanity) obviously involve different sorts of ways in which the wrong of killing is modified by extenuating circumstances. But at most all that this argues for is that the defences of provocation and diminished responsibility are defined as separate defences. There is no need for the type of offence, to which they both act as a partial defence, to be itself differentiated in the same way.

Differentiation based on factors other than fault

A key element of the way in which homicide offences are currently structured is the mental element of the different offences. Other criteria for distinguishing homicides could be by reference to the mode of killing or characteristics of the parties (victim or perpetrator). Indeed this approach is already used in respect of road traffic and corporate homicides. It was noted earlier that Hume described a specific category of aggravated murder defined in terms of the nature of the assault and the identities of the parties.

A more recent example of this approach can be found in the Homicide Act 1957, which arose out of the work of a Royal Commission on capital punishment. The Commission had considered the possibility of leaving alone the murder/culpable homicide (manslaughter) distinction but of sub-dividing murder into capital and non-capital cases (as was and is the practice in some parts of the United States). But the Royal Commission rejected this idea as being impractical and impossible to identify any coherent basis for the subdivisions.⁵⁰ Nonetheless, the resulting legislation divided murders into capital and non-capital.⁵¹ Capital murders were those: done in the course of theft; by shooting or by causing an explosion; done resisting arrest; whilst escaping legal custody; of a police officer acting in the execution of his duty; of a prisoner of a prison officer; and repeat or multiple murders.

As with Hume's list of aggravated murders, the main emphasis was on the method of killing and the identity of the victim. The 1957 Act was not a success, and its repeal led the way to the abolition of the death penalty in 1965. The problem with the 1957 Act was that its categorisation of murder as capital and non-capital was driven solely by issues of penalty. But, unlike more modern divisions of murder which use similar criteria for purposes of sentencing, it made no allowance for mitigating or (aggravating) circumstances within each category of capital killing.

⁴⁹ Andrew Ashworth & Barry Mitchell, "Introduction" in A Ashworth and B Mitchell (eds), *Rethinking English Homicide Law* (OUP, 2000), p 16.

⁵⁰ *Report of the Royal Commission on Capital Punishment* (Cmnd 8932, 1953), p 189.

⁵¹ Homicide Act 1957, ss 5 (death penalty for certain murders) and 6 (death penalty for repeated murders).

Separate offences for road traffic and corporate killings

Homicides arising from the driving of vehicles have been beyond the common law offences for decades.⁵² Of course where a car is used as a weapon for attacking someone a charge of murder would be appropriate. In *HM Advocate v Purcell*,⁵³ a man was charged with murder where he killed a pedestrian while driving a car recklessly. The court held that in the absence of an intention to injure the victim a conviction for murder was not possible. But at the same time the offence committed in this case was a common law culpable homicide, which suggests that such an offence could have been itself charged rather than an offence under the Road Traffic Act. The question, then, is whether in principle there is any point in having such separate statutory offences. There is a convincing case for the view that road traffic offences are essentially concerned with criminalising dangerousness; where death occurs as a consequence of driving, the conduct should be treated as culpable homicide provided it falls within the range of that offence.⁵⁴ From the perspective of fair labelling, what matters is that death has occurred unlawfully, the fact that it is caused by driving seems of much less significance.

Another area where a separate offence exists is corporate homicide introduced by the Corporate Manslaughter and Corporate Homicide Act 2007. There is no doubt that the offence under the 2007 Act, whatever its defects, is an improvement upon the common law approach to corporate homicide in Scotland, and in particular the insistence of the courts in adhering to the need to identify a specific person or persons within a corporation who had the necessary controlling, and guilty, mind. But the common law could have developed differently, and the adoption of a test of an aggregating or cumulative theory of corporate activity or of management failure was not beyond the scope of proper judicial development. Nor would it be sufficient to leave prosecution of corporate failings, especially those involving death, to laws dealing with health and safety at work. It would be literally a category error to consign a form of criminal homicide to that part of the law. Criminal homicides are part of the law of homicide. At the same time failure by the court to develop legal doctrine on corporate liability could have been put right by reforming the law on corporate liability could have been made in the context of the common law offence rather than by creating a separate statutory offence. As against this view, the very fact that a specialised form of guilty mind would have been required even for common law purposes suggests that the offence itself should be differently categorised.

Redrawing the division between murder and culpable homicide

In the previous discussion on whether there should be separate offences for road traffic and corporate killings, one reason for retaining separate offences is that the present law on murder and culpable homicide is itself unsatisfactory. There are large issues involved in the discussion of the division between murder and culpable

⁵² Historically separate statutory road traffic homicide offences were justified on the basis that juries were thought to be reluctant to convict of murder or culpable homicide drivers who caused death by driving dangerously or carelessly. But even if this was the case, it seems an unprincipled basis for a separate category of road traffic homicide offences. Moreover, if there were such views in the past, public attitudes towards killing on the road now appear to be more inclined towards treating them as akin to common law homicides. See B Mitchell, "Further Evidence of the Relationship Between Legal and Public Opinion on the Law of Homicide" [2000] Crim L Rev 814, 823-824.

⁵³ 2008 JC 131.

⁵⁴ See Sally Cunningham, "Vehicular Homicide: Need for a Special Offence" in CMV Clarkson & Sally Cunningham (eds), *op cit* at footnote 000, 97-123.

homicide, but as with many parts of the criminal law, the debate in Scots law is very much underdeveloped when compared with other legal systems. It must also be borne in mind that the distinction does not necessarily depend on the existence of a mandatory sentence for murder. If the mandatory sentence were to go, the issue would still arise whether murder and culpable homicide should be distinguished, and if so, how.

In most general terms, the issues involve the desirable scope of the crime of murder and the related matter of the nature and structure of culpable homicide.

One major problem is that culpable homicide is too widely defined, and contains quite disparate elements. Indeed it has for long been thus. Hume described the structure of homicide offences in terms of four separate levels:⁵⁵

- (a) Non-blameable homicide, sub-divided into (i) casual homicide and (ii) justifiable homicide;
- (b) Homicide less than murder but blameable;
- (c) Murder;
- (d) Aggravated murder.

In modern times aggravated murder has disappeared, at least as a category of homicide offence. In modern eyes the key distinction is between (b) and (c). But for Hume the crucial contrast lay elsewhere. For Hume the primary distinction was between (a) on the one hand and on the other hand (b), (c), and (d) taken together. That is to say, the crucial part of the structure is the difference between non-culpable homicide and all the categories of culpable homicide. On this basis culpable homicide is not a lesser version of murder; rather murder is a greater type of culpable homicide.⁵⁶ The difficulty is that the second level has no clearly marked-out name. Culpable homicide becomes a residual category; it is the type of blameworthy killing which is not murder. But unless we already know how to define murder this category becomes difficult to grasp.

In the present law culpable homicide remains the residual category but there is simply too many disparate elements within its scope.⁵⁷ Murder is still essentially defined in the terms of Macdonald as:⁵⁸

"Murder is constituted by any wilful act causing the destruction of life, whether [wickedly] intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences."

An unlawful killing which is not caught by this definition is, unless it is a separate species of homicide, a form of culpable homicide. But within culpable homicide there are several subdivisions. The problem is that these subdivisions are not 'official' categories of culpable homicide but act rather as analytical distinctions. Nonetheless, they do indicate important differences between types of culpable homicide and the issue of appropriate labelling therefore arises.

⁵⁵ Hume, I, 191.

⁵⁶ The distinction between culpable and non-culpable homicide and of murder being a particular form of culpable homicide has a long tradition. It appears also in the 19th Century criminal codes (see for example, Indian Penal Code 1860, ss 299-301).

⁵⁷ This can be seen from Hume's opening discussion of this point where he says that "culpable homicide appears to be of several kinds and degrees; and these are grounded in different reasons" (I, 233).

⁵⁸ For explanation of the additional 'wickedly' to qualify intention see footnote 000 above.

One such distinction is between voluntary and involuntary culpable homicide. This terminology is confusing and should be avoided. A so-called voluntary culpable homicide is one where the conduct falls within the scope of murder but where an extenuating factor exists in the form of provocation or diminished responsibility. The effect of this factor is that the accused is not liable to be convicted of murder but instead of culpable homicide.

The historical explanation for the recognition of these partial defences is the need to avoid applying a mandatory penalty, especially when that was capital in nature, when these mitigating circumstances are present. But these culpable homicides are quite different from the others. Furthermore, labelling requires not only that they should not be called murder but that they should be distinguished from other culpable homicides. The question then is what is an appropriate label. As already noted, the English Law Commission has recommended a three-tiered structure of homicide offences. Murder would be divided into two degrees. The mandatory sentence would apply to first degree, but not to second degree, murder. The problem with the Commission's recommendation is that it includes in second degree murder homicides where there is an intent to do serious injury and or intent to cause injury where there is awareness of a serious risk of causing death. Whether such killings are to be classified as murder or manslaughter is one thing but labelling cases of provocation and diminished responsibility along with these killings seems wrong. Killing under extenuating circumstances is not murder and should have its own separate label.

Involuntary culpable homicides are those which are not voluntary ones. Within the level of involuntary culpable homicides, there is a further distinction between lawful act killings (where a fault element of gross negligence is required) and unlawful act killings (where death occurs as a consequence of a criminal act even though there is no intention to kill or to injure the accused). There is much work to be done in working out this distinction, which in practice can become blurred. As for the unlawful act type, it is not entirely clear which crimes do and should attract this label when death occurs.⁵⁹ The notion of lawful act culpable homicide is unsatisfactory. What transforms the act into a type of homicide when death ensues is a degree of negligent acting which displays a state of mind that is criminally indifferent as to consequences.⁶⁰ But there is an element of circularity in this approach. A lawful act becomes a criminal one when committed with a criminal state of mind. It is difficult to be precise about when negligence becomes so gross that it is of the form of mens rea.

More fundamentally whatever the contours of unlawful and lawful act culpable homicides, should they be labelled as the same sort of crime? This approach has long been adopted in Scots law, as in other systems.⁶¹ But do they involve the same sort of wrong? If not, should there be separate labels for the two categories,

⁵⁹ At present assault does but here there is a clear moral link between committing an attack with evil intent and holding the accused liable for an ensuing death even if that death was not intended. It is less easy to identify such a link in other offences.

⁶⁰ This is the formulation made in the classic case of *Paton v HM Advocate* 1936 JC 19. The emphasis on gross negligence as evidencing a criminal state of mind has been made in later cases (see, for example, *Transco plc v HM Advocate* 2004 JC 29).

⁶¹ The English Law Commission's most recent work of the structure of homicide, which is very much informed by the principles of fair labelling, has recommended that manslaughter should continue to categorise unlawful act and lawful act killings as undifferentiated forms of manslaughter. (Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304 (2006)). A similar approach was adopted by the Law Reform Commission of Ireland (see *Homicide: Murder and Involuntary Manslaughter* (LRC No 87 (2008)).

not just as analytical distinctions but legal categories? Furthermore where death occurs as a consequence of an act which is itself a type of crime, does the fatal outcome require a different offence or should it rather be an aggravating factor of that offence?

V

It is obvious that clarity is needed as to what should fall within the scope of culpable homicide. There is another major issue to consider. This concerns the desirable scope of the offence of murder; in other words, how to draw the line between murder and culpable homicide. An appropriate way of considering these issues is to look at the views of Sir Gerald Gordon.

Gordon's massive contribution to the writings on Scottish criminal law is based on a wide range of journal papers but in particular his monograph on *Criminal Law*.⁶² This book is one of the major pieces of writing on criminal law in the English-speaking world and its influence has been felt well beyond Scotland. It is not a re-working or updating of Hume but a statement of general principles of criminal law along with detailed discussions of the main offences in Scot criminal law. It is characterized by a theoretical rigour, integrating the writings of philosophers such as Gilbert Ryle, JL Austin, and Wittgenstein. A major influence was the work of Glanville Williams on English law, especially in relation to the need to understand mens rea primarily in a subjective sense but Gordon adopts a more nuanced approach to this issue than did Williams. Gordon accepts that intention as a form of mens rea must be subjective in nature but he argues that issues of interpreting and proving intention lessen the force of a subjective/objective distinction.⁶³ But, like Williams, Gordon did accept (at least on the context of murder) that recklessness should be understood subjective as otherwise the idea would collapse into negligence.

Though Gordon was willing to depart from Hume on the content of the law of homicide, in large part he follows the structure of the discussion set down by his predecessor in the chair of Scots Law. Gordon's begins with a consideration of general issues relating to criminal law (the general part), which is followed by examination of specific offences. Like Hume, Gordon does not take murder as his first topic, which is instead offences of dishonesty. The next part deals with non-sexual offences involving injury, and it is the second section of that part which considers homicide. Chapter 23 (of the first edition) considers murder. This chapter sets out in some 3 or 4 pages a discussion of homicide in general, including classes of homicide, largely on the Humean pattern.

When discussing murder as such Gordon suggests a distinction between 'voluntary' murder (characterized by the presence of an intention to kill) and 'involuntary murder' where there is no such intention.⁶⁴ At the end of this chapter he moves on to discuss 'justifiable homicide' but this is brief, and the topic of self-defence is dealt with on its own in the following chapter. The next chapter considers so-called 'voluntary' culpable homicide but this chapter focuses on provocation, and other partial or reductive defences to murder which can result in voluntary culpable homicide such

⁶² The first edition was published in 1967, the second edition in 1978. The third edition (volume 1, 2000; volume 2, 2001) was not edited by Gordon.

⁶³ The key writing here is GH Gordon, "Subjective and Objective Mens Rea" (1974-75) 17 *Criminal Law Quarterly* 355, a paper which shows distinctly Wittgensteinian influence.

⁶⁴ "It is undisputed that murder can be committed unintentionally, that is to say, without any intention to kill the deceased" (1st edn, p 679).

as diminished responsibility or intoxication⁶⁵ are dealt with in other parts of the book. The following chapter deals with 'involuntary' culpable homicide, and the discussion considers the three categories of lawful conduct culpable homicide; assault culpable homicide; and 'other' unlawful conduct culpable homicide.

The general theme running through the discussion of homicide, especially murder, is that Scots law is uncertain and at times difficult to state. Gordon recognizes that its flexibility has advantages but his attitude towards this flexibility is never entirely free from ambiguity.⁶⁶

But certain issues are dealt with more on general principle than as according with the dicta of decided cases. On one particular issue Gordon's view have been clear and unwavering, namely that the mental element of murder (and hence of the scope of the crime) must be read narrowly. Clearly intention to kill suffices; but in the absence of such intention there must be an intention to cause injury in circumstances amounting to a display of wicked recklessness. At times there has been a tendency to use the idea of wicked recklessness loosely as embodying an objective judgment of the accused's conduct. But this is not Gordon's approach. For him the paradigm case of murder is where there is intention to kill. But where there is intention to cause injury there may also be circumstances which make the accused's state of mind morally equivalent to that of someone who intends to take life.⁶⁷

"Murder is the most heinous of all crimes, and cannot be present in the absence of wickedness and depravity. Such wickedness and depravity is clearly present where the killing was intentional; where the killing was unintentional but caused by an assault these qualities must be found in the nature of the assault, which must exhibit 'wicked recklessness'. Recklessness is therefore not so much a question of gross negligence as of wickedness. Wicked recklessness is recklessness so gross that it *indicates a state of mind which is as wicked and depraved as the state of mind of a deliberate killer.*"

In *HM Advocate v Purcell*,⁶⁸ an accused was charged with murder where it was alleged that a boy had been killed after he was struck by a car which the accused had been driving in a dangerous manner but where the accused had not any intention to injure the boy. The court held that the absence of such intention meant

⁶⁵ This position reflects the then rule that an accused who killed, but by reason of intoxication could not form the intention to kill or do serious injury, could not be convicted of murder but only of culpable homicide. This rule was critically examined by Gordon (1st edn, pp 357-362). It was removed by the decision in *Brennan v HM Advocate* 1977 JC 1.

⁶⁶ "The absence of an academically satisfactory definition of murder is, however, perhaps but a small price to pay for the practical advantage of flexibility" (1st edn, p 683).

⁶⁷ 1st edition, p 683 (emphasis added). This passage has remained virtually unchanged in later editions (see 2nd edition, para 23-17, pp 735-736; 3rd edn, vol 2, para 23.19, p 297). Gordon has more recently re-affirmed this key point: "Murder has never been restricted to intentional killing, and I am far from persuaded that the acceptance of recklessness as a mens rea for murder arose out of the idea that intention could be inferred from recklessness. Be that as it may, it is clear that recklessness is an independent form of mens rea and not just evidence of intention. But the law does require some form of intention to support the basic requirement of wickedness, and the only form acceptable, at least nowadays, is an intention to cause physical injury: it is not any conduct displaying wicked recklessness but only wicked recklessness in the carrying out of such an intention, which makes homicide murder" (Commentary on *HM Advocate v Purcell* 2007 SCCR 520, 530).

⁶⁸ 2008 JC 131, [2007] HCJ 13.

that the accused's conduct did not amount to murder, and expressly approved this passage (and others) in Gordon's book.⁶⁹

Clearly there are issues still to be resolved as to the scope of the crime of murder in Scots law. But for many of these the writings of Sir Gerald Gordon will usually be the first word, and often the final word, in finding the solution.

⁶⁹ "And talking of the modern law we would comment, importantly, that it should be noted that the views expressed in regard to that domain in the 3rd edition of Gordon are those expressed in the 1st edition, published some 40 years ago in 1967. Since that time they have represented the accepted views among jurists which have not been the subject of any subsequent challenge." [para 16]. The same passage was treated as significant in *Petto v HM Advocate* 2009 SLT 509, [2009] HCJAC 43. That case involved a charge of murder that the accused had killed a man and then set fire to the flat where the victim lived. The fire spread throughout the building and killed a woman living on another flat. It was accepted that the accused must have known that other flats in the building would have been occupied at the time he started the fire. The case was remitted to a fuller bench on the issue whether on these facts the accused had the mens rea of murder in accordance with the approach set out by Gordon.

Appendix

HONOURS CRIMINAL LAW

SYLLABUS

1ST TERM

WEEK 1	Introductory
" 2	Devlin and Hart, I
" 3	Devlin and Hart, II
" 4 - 5	Euthanasia; Abortion; Drugs; Obscenity
" 6	Theories of Punishment
" 7	The Need for Mens Rea (Wootton-Hart)
" 8	Definition of insanity
" 9	The need for an insanity defence
" 10	Persistent and Dangerous offenders

2ND TERM

WEEK 1	An Introduction to Mens Rea
" 2	Subjective and Objective Mens Rea
" 3	Some Australian Cases[*]
" 4	Negligence and Error
" 5	Intoxication and Automatism
" 6	General Defences
" 7	Criminal Procedure: Arrest and Search
" 8	Criminal Procedure: Statements by Accused

[* The Australian cases are *Ryan* (1966-67) 40 ALJR 488; *Vallance* (1961) 108 CLR 56; *Mamota-Kulang* (1964) 111 CLR 62; *Timbu Kulian* (1969-70) 119 CLR 47; *Pemble* (1971) 124 CLR 107.]